(2)

Supreme Court, U.S.
FILED
SEP 29 2004
OFFICE OF THE CLERK

No. 04-146

IN THE

Supreme Court of the United States

AEROFLOT RUSSIAN AIRLINES,

Petitioner,

v.

MGM PRODUCTIONS GROUP, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

FRED G. BENNETT
QUINN EMANUEL URQUHART OLIVER & HEDGES, LLP
865 South Figueroa Street
10th Floor
Los Angeles, CA 90017
(213) 443-3000

JEFFREY A. CONCIATORI
Counsel of Record
ROBERT C. JUMAN
PARTHA P. CHATTORAJ
QUINN EMANUEL URQUHART OLIVER & HEDGES, LLP
335 Madison Avenue
17th Floor
New York, NY 10017
(212) 702-8100

Attorneys for Respondent

190049

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED

1. Whether, pursuant to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, *done* June 10, 1958 in New York, 21 U.S.T. 2517, 330 U.N.T.S. 38 (effective in United States Dec. 29, 1970 and implemented at 9 U.S.C. §§ 201-208) (the "New York Convention" or "Convention"), a United States court may properly confirm the award of a foreign arbitration panel, compensating one party for another's breach of contract, when the contract does not violate United States or international law.

2. Whether this Court should grant certiorari when the decisions below are based on well-settled law, without any conflict with precedents of other Circuits or this Court.

STATEMENT PURSUANT TO RULE 29.6

Respondent, MGM Productions Group, Inc., has no parent corporation and no publicly held company owns 10% or more of its stock.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
STATEMENT PURSUANT TO RULE 29.6	ii
TABLE OF CONTENTS	iii
TABLE OF CITED AUTHORITIES	v
OPINIONS BELOW	1
STATEMENT OF THE CASE	1
A. The Consultation Agreement	1
B. The Arbitration in Sweden	2
C. The District Court Confirmation Proceedings	3
REASONS FOR DENYING THE PETITION	5
I. Neither of Aeroflot's "Questions Presented" Were Raised Or Decided by the Second Circuit's Summary Order	5
II. The Second Circuit's Decision Raises No Conflicts with Decisions of Other Circuits Or This Court	8
III. The Second Circuit's Decision Applies Properly Stated Rules of Law, And Does Not Raise Issues Worthy of Certiorari	10

Contents

Page

IV. Aeroflot's Theory That Any Violation of Trade Sanctions Constitutes a "Public Policy" Violation Under the Convention Is Without Merit 13

CONCLUSION 21

TABLE OF CITED AUTHORITIES

CASES

Page

A. Halcoussis Shipping Ltd. v. Golden Eagle Liberia Ltd., No. 88 Civ. 4500, 1989 WL 115941 (S.D.N.Y. Sept. 27, 1989) 13

Antco Shipping Co. v. Sidermar, S. p. A., 417 F. Supp. 207 (S.D.N.Y. 1976) 14, 16, 20

Belship Navigation, Inc. v. Sealift, Inc., No. 95 Civ. 2748, 1995 WL 447656 (S.D.N.Y. July 28, 1995) 16

CBS Corp. v. WAK Orient Power & Light Ltd., 168 F. Supp. 2d 403 (E.D. Pa. 2001) 8

Eastern Assoc. Coal Corp. v. United Mine Workers of Am., 531 U.S. 57 (2000) 12

Europcar Italia, S.p.A. v. Maiellano Tours, Inc., 156 F.3d 310 (2d Cir. 1998) 6, 7, 8

Harris Adacom Corp. v. Perkom Sdn Bhd, [1994] 3 Malayan L.J. 506 (Kuala Lumpur High Court Dec. 10, 1993), *excerpted in* 22 Y.B. Comm'l Arb. 753 18

Hurd v. Hodge, 334 U.S. 24 (1948) 13

Cited Authorities

Page

Industrial Risk Insurers v. M.A.N. Gutehoffnungshütte GmbH, 141 F.3d 1434 (11th Cir. 1998) 8

Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara, 364 F.3d 274 (5th Cir. 2004) 8

Ledee v. Ceramiche Ragno, 684 F.2d 184 (1st Cir. 1982) 9

Lloyd Capital Corp. v. Pat Henchar Inc., 603 N.E.2d 246, 80 N.Y.2d 124 (1992) 14

M&C Corp. v. Erwin Behr GmbH, 87 F.3d 844 (6th Cir. 1996) 8, 12

M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1 (1972) 9

McMullen v. Hoffman, 174 U.S. 639 (1899) 14

Ministry of Defense of Islamic Rep. of Iran v. Gould, Inc., 969 F.2d 764 (9th Cir. 1992) 9

Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985) 9, 12

Cited Authorities

Page

Nat'l Oil Corporation v. Libyan Sun Oil,
733 F. Supp. 800 (D. Del. 1990) 15, 16, 20

Nat'l Petrochemical Co. of Iran v. M/T Stolt Sheaf,
930 F.2d 240 (2d Cir. 1991) 13

Omnium de Traitement et de Valorisation SA v. Hilmarton Ltd.,
[1999] 2 Lloyd's Rep. 222
(Q.B. Comm. Ct. 1999) (Eng.) 18

Parsons & Whittemore Overseas Co. v. Societe Generale de L'Industrie du Papier (RAKTA),
508 F.2d 969 (2d Cir. 1974) ..... *passim*

Scherk v. Alberto-Culver Co.,
417 U.S. 506 (1974) 9, 12

Slaney v. Int'l Amateur Athletic Fed'n,
244 F.3d 580 (7th Cir. 2001) 8

Soleimany v. Soleimany,
1998 WL 1043634, [1999] Q.B. 785
(C.A. 1998) (Eng.) 18, 19

United Paperworkers Int'l Union, AFL-CIO v. Misco, Inc.,
484 U.S. 29 (1987) 6, 12

Cited Authorities

Page

Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer, 515 U.S. 528 (1995) 11

W.R. Grace & Co. v. Local Union 759, Int'l Union of United Rubber Workers, 461 U.S. 757 (1983) 6, 12

Waterside Ocean Navigation Co. v. Int'l Navigation Ltd., 737 F.2d 150 (2d Cir. 1984) 8

Westacre Investments Inc. v. Jugoimport-SPDR Holding Co., 1999 WL 477322, [2000] Q.B. 288, [1999] 2 Lloyd's Rep. 65 (C.A. 1999) (Eng.) 18

UNITED STATES CONSTITUTION

Fourteenth Amendment 14

RULES

Second Circuit Local Rule 0.23 11

United States Supreme Court Rule 10 10

Page

STATUTES

9 U.S.C. §§ 201-208 i

22 U.S.C. § 2370(p) (1971) 14

22 U.S.C. § 2370(t) (1971) 14

REGULATIONS

31 C.F.R. § 560.204 4

31 C.F.R. § 560.206 3

31 C.F.R. § 560.208 4

31 C.F.R. § 560.410 3

31 C.F.R. § 560.501 to .537 20

31 C.F.R. § 560.515 3

Page

OTHER AUTHORITIES

Susan Choi, *Judicial Enforcement of Arbitration Awards Under the ICSID and New York Conventions*, 28 N.Y.U. J. Int'l L. & Pol. 175 (1997) 17

FOUCHARD, GAILLARD, & GOLDMAN, INTERNATIONAL COMMERCIAL ARBITRATION (Emmanuel Gaillard, *et al.*, eds., Kluwer Law International 1999) 17

International Law Association Committee on International Commercial Arbitration, *Final Report on Public Policy as a Bar to Enforcement of International Arbitral Awards*, *in* International Law Association, *Report of the New Delhi Conference* (2002) 17

Judgment of May 11, 1983, 1983 Osterreichische Juristenzeitung 519 (Oberster Gerichtshof) (Austria), *excerpted in* 10 Y.B. Comm'l Arb. 421 18

Shai Wade, *Westacre v. Soleimany: What Policy? Which Public?*, 2(3) Int'l Arb. L. Rev. 97 (1999) 19

Respondent MGM Productions Group, Inc., respectfully prays that the Petition for Writ of Certiorari sought in this matter be denied.

OPINIONS BELOW

Petitioner Aeroflot-Russian Airlines seeks review of the unpublished summary order of the United States Court of Appeals for the Second Circuit, *MGM Productions Group, Inc. v. Aeroflot Russian Airlines*, 91 Fed. Appx. 716 (2d Cir. Feb. 9, 2004), reprinted at Appendix 1a-3a to the Petition for the Writ of Certiorari (the "Petition"). The Second Circuit denied Petitioner's petition for rehearing on April 28, 2004; the unpublished order is reprinted at Appendix 17a to the Petition. The Second Circuit's February 9, 2004 summary order affirmed the unreported May 14, 2003 decision of the United States District Court for the Southern District of New York, available at 2003 U.S. Dist. LEXIS 8174 and 2003 WL 21108367 and reprinted at Appendix 4a-16a to the Petition. The District Court confirmed the November 29, 2002 award of a panel of arbitrators of the Arbitration Institute of the Stockholm [Sweden] Chamber of Commerce, certain excerpts of which appear at Appendix 20a-38a to the Petition.

STATEMENT OF THE CASE

A. *The Consultation Agreement*

In June 1992, Aeroflot-Soviet Airlines, the predecessor-in-interest to Petitioner Aeroflot-Russian Airlines ("Petitioner" or "Aeroflot"), and Russo International Management, Inc. ("Russo"), the predecessor-in-interest to Respondent MGM Productions Group, Inc. ("Respondent" or "MGM"), entered into an exclusive Consultation Agreement ("Agreement"), under

which Russo was to provide consultation services to Aeroflot in connection with Aeroflot's leasing of commercial aircraft and other equipment to Iran Air. The Agreement provided that all disputes should be settled by binding arbitration in Stockholm, Sweden pursuant to the laws of New York State and Russia.

Until August 1996, Russo performed consulting services under the Agreement, and Aeroflot paid some, but not all, of the fees due thereunder. Aeroflot never contended that Russo had breached the Agreement, and never terminated it. Nonetheless, in August 1996, Aeroflot stopped paying fees to Russo altogether, despite repeated representations that payments would resume. After informal attempts to obtain payment failed, Russo submitted a Request for Arbitration to the Arbitration Institute of the Stockholm Chamber of Commerce (the "Institute") on October 27, 1998.

During the period up through and including at least July 2002, Aeroflot continued to sell and lease commercial aircraft, spare parts, and support services to various Iranian airlines, reaping hundreds of millions of dollars in payments. Russo did not receive a payment of consulting fees from Aeroflot after August 1996.

B. ***The Arbitration in Sweden***

The Institute seated an arbitration panel consisting of Justice Staffan Magnusson of the Supreme Court of Sweden (appointed by the Institute), Professor Alexei A. Kostin of the International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation (selected by Aeroflot), and Gerald Aksen, a partner in the New York law firm Thelen, Reid & Priest (selected by

Russo) (collectively, the "Tribunal"). The Tribunal appointed Hakan Sandesjo, Deputy Director General of Sweden's Aliens Appeals Board, as its Secretary.

After years of discovery and other proceedings, the parties appeared before the Tribunal for a four-day hearing in June 2002. For its defense, in addition to asserting substantive contractual grounds under Russian and New York law, Aeroflot asserted that the Agreement was void under New York law and U.S. public policy because it violated Executive Orders by Presidents Reagan and Clinton, as well as the 1995 versions of three provisions of the Iranian Transactions Regulations ("ITRs") promulgated by the Office of Foreign Assets Control ("OFAC") of the U.S. Department of the Treasury, 31 C.F.R. §§ 560.206, 560.410, and 560.515.

On November 29, 2002, the Tribunal issued a thorough and detailed 81-page arbitral award ("Award"), finding that Aeroflot had breached the Agreement and directing Aeroflot to pay Russo more than $13 million in damages, plus interest and costs, totaling more than $17 million. Pet. App. 36a-37a. In the Award, the Tribunal analyzed and rejected each of Aeroflot's arguments, including its arguments that the Agreement violated the ITRs. On January 21, 2003, Russo assigned all of its rights and interest in the Award to MGM.

C. *The District Court Confirmation Proceedings*

In accordance with the New York Convention, on January 23, 2003, MGM filed a Verified Petition to Confirm the Arbitral Award and for Entry of Judgment in the United States District Court for the Southern District of New York. Aeroflot opposed MGM's Petition exclusively on the ground that confirmation of the Award fell under the "public policy"

exception in Article V(2)(b) of the Convention because the Agreement allegedly violated the ITRs. For the first time, Aeroflot argued that confirmation of the Award would violate the 1997 versions of the ITRs it had cited to the Tribunal; Aeroflot also alleged violations of 1995 and 1997 provisions of the ITRs, 31 C.F.R. §§ 560.204 and 560.208, that it had never previously cited.

After extensive briefing and oral argument, on May 14, 2003, the District Court issued a carefully reasoned twelve-page Decision and Order confirming the Award. After considering all of Aeroflot's evidentiary submissions, the District Court, like the Tribunal, found that the Agreement did not violate the ITRs, and therefore rejected Aeroflot's public policy defense to confirmation of the Award. Pet. App. 11a. The District Court held in the alternative that even if the Agreement violated the ITRs, this "violation of United States foreign policy" would not contravene the United States' "most basic notions of morality and justice" and thus would not fall within the public policy exception to the Convention. Pet. App. 11a-13a.

Aeroflot appealed. The Second Circuit affirmed the judgment of the District Court in a February 9, 2004 unpublished Summary Order ("Summary Order"). In its Summary Order, the Second Circuit agreed with the District Court that the Agreement did not violate the ITRs, and therefore confirmation of the Award would not fall within the Convention's public policy exception. Pet. App. 2a-3a. After its petition for rehearing was denied, Pet. App. 17a, Aeroflot unsuccessfully moved to stay issuance of the Second Circuit's mandate. This Petition followed.

REASONS FOR DENYING THE PETITION

Because the Second Circuit itself found that the Agreement did not violate the ITRs, the "public policy" questions set forth in the Petition are not fairly presented for review by this Court. Moreover, the decisions below, which were based on well-settled case law interpreting the New York Convention, do not conflict with any decision of this Court or any Court of Appeals. Also, because the decisions below, neither of which was published, apply with specificity to these litigants under the unique facts presented by this case, the Petition does not present issues worthy of review by this Court. Finally, the decisions below, which reflect thirty years of virtually unanimous precedent in the United States and worldwide, are supported by the policy considerations underlying the New York Convention itself, which do not recognize trade sanctions as national "public policy" sufficient to permit a court to disregard a foreign arbitral award.

I. Neither of Aeroflot's "Questions Presented" Were Raised Or Decided by the Second Circuit's Summary Order.

The first "Question Presented" posed by Aeroflot — "[w]hether a U.S. court should defer to a foreign arbitral panel in determining whether the panel's award is contrary to U.S. public policy. . . ." (Pet. i) — is not raised by the Second Circuit's unpublished summary order. The Second Circuit panel cited specifically to the arbitrators' finding that "the Agreement provided only for transactions between Russo and Aeroflot," and noted that the Court should "accord great deference to the arbitrator's factual findings and contractual construction," *i.e.*, the uncontroversial proposition that an

arbitration award should not be avoided based on an arbitrator's alleged error of law or fact. Pet. App. 2a (citing *Europcar Italia, S.p.A. v. Maiellano Tours, Inc.*, 156 F.3d 310, 316 (2d Cir. 1998)). The Tribunal did not (and could not) opine as to what U.S. public policy is, under the Convention's procedures for confirmation of arbitral awards, and the Second Circuit panel certainly did not (and could not) "defer" to the Tribunal's non-existent determination of U.S. law. In other words, the Second Circuit properly made its own determination about the legal consequences, under the Convention, of the facts already found and contractual interpretation applied by the Tribunal. Aeroflot's reliance on *United Paperworkers Int'l Union, AFL-CIO v. Misco, Inc.*, 484 U.S. 29 (1987), is thus misplaced. The *Misco* Court specifically held that "[a] court's refusal to enforce an arbitrator's interpretation of a[n] . . . agreement is limited to situations where the contract *as interpreted* would violate 'some explicit public policy. . . .'" *Id.* at 43 (quoting *W.R. Grace & Co. v. Local Union 759, Int'l Union of United Rubber Workers*, 461 U.S. 757, 766 (1983)) (emphasis added). Here, the contract as interpreted by the Tribunal did not violate public policy, so the Second Circuit's enforcement of the resulting arbitral award did not raise the "deference" issue contained in Aeroflot's first "Question Presented."

In any event, the Summary Order states that even if no deference were given to the Tribunal's findings, the result would be the same, because the Court of Appeals determined in the alternative that "it would be, at most, doubtful that the Agreement violated the 1995 ITRs." Pet. App. 3a. Having reached its own independent conclusion that the Agreement likely did not violate the ITRs, the Second Circuit went on to conclude that enforcement of the Agreement would not violate U.S. "public policy." *See Misco*, 484 U.S. at 44

(holding that "speculation or assumption" that was "tenuous at best" provided "insufficient basis" for public policy challenge to arbitral award). Thus, because the Court of Appeals did not "defer" to the foreign arbitral panel "in determining whether the panel's award is contrary to U.S. public policy," the first alleged Question Presented is simply not presented for review.

The second "Question Presented" posed by Aeroflot, which asks "whether an arbitral award ordering payment under a contract that violates U.S. sanctions laws . . . is contrary to U.S. public policy within the meaning of the New York Convention" (Pet. i), also was not raised by the Second Circuit's unpublished summary order. The Second Circuit panel did not purport to uphold an award of payment despite a violation of "sanctions laws." Rather, it specifically held that it was "at most, doubtful" that the Agreement violated the 1995 version of the ITRs and that the Award was not governed by the 1997 ITRs because Aeroflot's breach of the Agreement occurred prior to the effective date of the 1997 ITRs.[1] Thus, because the Second Circuit, the District Court, and the Tribunal have all found that the Agreement *did not violate* U.S. "sanctions laws," the second alleged "Question Presented" is not properly presented for decision by this Court.

---

1. In any event, at the arbitration Aeroflot failed to argue the applicability of the 1997 version of the ITRs and failed to adduce any evidence of any alleged violation of those regulations. Accordingly, although the Second Circuit elected to consider the applicability of the 1997 ITRs, this argument was waived, *see, e.g.*, *Europcar Italia, S.p.A. v. Maiellano Tours, Inc.*, 156 F.3d 310, 315 (2d Cir. 1998), and does not provide a basis for a grant of certiorari.

II. The Second Circuit's Decision Raises No Conflicts with Decisions of Other Circuits Or This Court

Aeroflot does not claim that there is any conflict in the circuits, or any similar issues pending in other circuits that would warrant review by this Court. *Parsons & Whittemore Overseas Co. v. Societe Generale de L'Industrie du Papier (RAKTA)*, 508 F.2d 969 (2d Cir. 1974), which established that an arbitral award is enforceable in the U.S. unless enforcement would "violate the forum state's most basic notions of morality and justice" was decided thirty years ago and is still controlling authority. *See, e.g., Europcar Italia, S.p.A. v. Maiellano Tours, Inc.*, 156 F.3d 310, 315-16 (2d Cir. 1998); *Waterside Ocean Navigation Co. v. Int'l Navigation Ltd.*, 737 F.2d 150, 152-53 (2d Cir. 1984).

Aeroflot misleadingly suggests that only "the Second Circuit and state and district courts following Second Circuit precedent" apply an anomalously narrow interpretation to the "public policy exception" to the New York Convention. Pet. 6. Tellingly, Aeroflot fails to cite *a single* decision of any United States Court of Appeals that conflicts with the Second Circuit's holdings. In fact, the Second Circuit's analysis of Article V(2)(b) of the Convention has been expressly endorsed by the Fifth, Sixth, Seventh, and Eleventh Circuits, as well as numerous other federal courts. *See, e.g., Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 364 F.3d 274, 305-06 (5th Cir. 2004); *Slaney v. Int'l Amateur Athletic Fed'n*, 244 F.3d 580, 593 (7th Cir. 2001); *Industrial Risk Insurers v. M.A.N. Gutehoffnungshütte GmbH*, 141 F.3d 1434, 1445 (11th Cir. 1998); *M&C Corp. v. Erwin Behr GmbH*, 87 F.3d 844, 851 n.2 (6th Cir. 1996); *CBS Corp. v. WAK Orient Power & Light Ltd.*, 168 F. Supp. 2d 403, 415 (E.D. Pa. 2001); *see also*

Ledee v. Ceramiche Ragno, 684 F.2d 184, 187 & n.3 (1st Cir. 1982) (enforcing foreign arbitration provision under Article II of Convention despite contrary Puerto Rico statute) (citing *Parsons*).[2] Thus, far from being an outlier, the Summary Order is in accord with *unanimous* federal case law on this issue.

Contrary to Aeroflot's suggestions, the Summary Order and the *Parsons* decision are also in perfect harmony with the Supreme Court's many decisions holding that both the Convention and the broader public policy of this nation favor resolution of international commercial disputes in foreign arbitral forums in accordance with parties' arbitration agreements. *See, e.g., Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 639 n.21 (1985) ("The utility of the Convention in promoting the process of international commercial arbitration depends upon the willingness of national courts to let go of matters they normally would think of as their own."); *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 520 n.15 (1974) (noting with approval that Congress' purpose in entering the Convention was "to encourage the recognition and enforcement of commercial arbitration agreements in international contracts and to unify the standards by which agreements to arbitrate are observed and arbitral awards are enforced in the signatory countries"); *cf. M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 9 (1972) (rejecting "public

2. In *Ministry of Defense of Islamic Rep. of Iran v. Gould, Inc.*, 969 F.2d 764 (9th Cir. 1992), the Ninth Circuit expressly declined to rule on public policy arguments under the Convention that were based on the ITRs. *See id.* at 773-74. Accordingly, the Ninth Circuit's opinion sheds no light at all on the public policy exception under the Convention, and certainly does not suggest any "split" in interpretation from the other Courts of Appeals.

policy" challenge to contractual choice of foreign forum and stating, "The expansion of American business and industry will hardly be encouraged if, notwithstanding solemn contracts, we insist on a parochial concept that all disputes must be resolved under our laws and in our courts. . . . We cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our courts."). Thus, the Summary Order is consistent with all available authority, leaving no basis for certiorari.

III. The Second Circuit's Decision Applies Properly Stated Rules of Law, And Does Not Raise Issues Worthy of Certiorari

As this Court's Rules make clear, "[a] petition for certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Sup. Ct. R. 10. Aeroflot's feeble attempts to attack the Summary Order – and, for the first time in this Petition, the Second Circuit's landmark *Parsons* decision – are without merit and thus do not raise any issues worthy of certiorari.

First, Aeroflot incorrectly states that the Petition "relates to a pure issue of law, not the facts of the transaction or the interpretation of the contract." Pet. 8 n.4. This is simply untrue, as the Summary Order recognized when it noted the deference due to the Tribunal's "factual findings and contractual construction" and recounted the Tribunal's factual finding that "the Agreement provided only for transactions between Russo and Aeroflot." Pet. App. 2a. This factual finding, which provided an independent basis for the Tribunal's determination that the transactions at issue did

not violate the ITRs, was reflected in the Tribunal's finding that "Russo's consulting responsibilities ran only to Aeroflot and not to any entity in Iran." Pet. App. 31a. Thus, because the decision below turns upon its own unique facts, and it will affect no one other than the litigants in this case,[3] it is an improper vehicle to address the broad questions Aeroflot wishes this Court to answer.

Second, Aeroflot's argument that the Second Circuit abdicated its duty to review public policy challenges to arbitral awards is simply wrong. As set forth in Part I, *supra*, both the District Court and the Second Circuit specifically addressed Aeroflot's public policy arguments and held that they had no merit. The Tribunal merely made factual findings and interpreted the Agreement between the parties. Thus, even if Aeroflot were correct that "private arbitrators owe no duty to safeguard the public interest" and therefore that public policy challenges are within the unique province of the federal judiciary (a proposition not supported by this Court's prior decisions), this argument would be beside the point, because the Tribunal did not, and could not, rule as to the effect of U.S. public policy on the petition to confirm the arbitration award. In other words, the judicial review prompted by MGM's petition to confirm the award has satisfied the requirement of judicial review of public policy challenges to arbitral awards that Aeroflot claims to find in this Court's precedents, such as *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 540 (1995) (U.S. courts'

3. The unpublished Summary Order may not be cited in unrelated cases and thus has no precedential value. *See* Second Circuit Local Rule 0.23. As Aeroflot concedes, "where the only interests at stake are those of the parties to the arbitration, courts are rightly hesitant in entertaining a party's complaints about the unfairness of the forum it chose by contract." Pet. 15.

review "at the award enforcement stage" is sufficient to "ensure that the legitimate interest in the enforcement of the . . . laws has been addressed"), and *Misco*, 484 U.S. at 44-45 ("Nor does the fact that it is inquiring into a possible violation of public policy excuse a court for doing the arbitrator's task").

Third, although Aeroflot argues that international arbitrations should be accorded no more deference than any other arbitral proceeding, this Court's teachings about the broad pro-enforcement bias underlying the New York Convention fully support the Second Circuit's view, reflected in the *Parsons* decision and its progeny, that international arbitral awards under the Convention are entitled to significant deference. *See, e.g.*, *Mitsubishi*, 473 U.S. at 638 ("the efficacy of the arbitral process requires that substantive review at the award-enforcement stage remain minimal"); *Scherk*, 417 U.S. at 520 n.15; *see also M&C Corp.*, 87 F.3d at 851 n.2 ("Whatever may be meant by the manifest disregard doctrine in domestic arbitration cases, it is clear that such a doctrine does not rise to the level of a violation of public policy that is necessary to deny confirmation of a foreign arbitral ~~award~~."). In addition, the Convention's supranational emphasis renders irrelevant the case law on labor-management arbitrations pursuant to collective-bargaining agreements under United States law, on which Aeroflot relies. *See Eastern Assoc. Coal Corp. v. United Mine Workers of Am.*, 531 U.S. 57, 60 (2000); *Misco*, 484 U.S. at 31-32; *Grace*, 461 U.S. at 762-63. Moreover, even in these domestic labor arbitration cases, this Court ruled that the issues alleged to constitute violations of public policy did not rise to the level necessary to set aside an arbitral award. *See id.*

IV. Aeroflot's Theory That Any Violation of Trade Sanctions Constitutes a "Public Policy" Violation Under the Convention Is Without Merit

Aeroflot's insistence that an alleged violation of "positive" or "mandatory" laws "designed to protect the interests of the State" inevitably translates into a "public policy" under the Convention, Pet. 13-16, directly conflicts with well-settled authority. *See, e.g., A. Halcoussis Shipping Ltd. v. Golden Eagle Liberia Ltd.*, No. 88 Civ. 4500, 1989 WL 115941, at *2 (S.D.N.Y. Sept. 27, 1989):

> All laws, be they procedural or substantive, are founded on strong policy considerations. Yet not all laws represent this country's 'most basic notions of morality and justice.' Were it otherwise, the Convention's public policy exception would eviscerate the very goal of the Convention as a whole – to encourage the recognition and enforcement of commercial arbitration agreements.

Aeroflot has not cited *any* authority for the proposition that trade sanctions, generally, or the ITRs, specifically, constitute the "public policy" of the United States *for purposes of the Convention*. The only cases cited by Aeroflot deal with the domestic enforcement of contracts – not the confirmation of international arbitration awards – and are thus irrelevant to the issues before this Court. *See Nat'l Petrochemical Co. of Iran v. M/T Stolt Sheaf*, 930 F.2d 240 (2d Cir. 1991) (refusing to allow the Iranian government to enforce a contract for the exportation of prohibited goods from the U.S. to Iran); *Hurd v. Hodge*, 334 U.S. 24, 35-36 (1948) (prohibiting District of Columbia courts' enforcement of racially restrictive

covenants pursuant to inherent supervisory powers, Civil Rights Act, Fourteenth Amendment, and "public policy"); *McMullen v. Hoffman*, 174 U.S. 639, 654-55 (1899) (refusing to enforce agreement to make illegally rigged bids on public works projects).[4]

Well-settled federal law demonstrates that, under the Convention, an arbitration award alleged to violate U.S. trade sanctions does not violate U.S. "public policy." In *Parsons*, the U.S. had enacted trade sanctions cutting off aid to Egypt well before the arbitrators issued their final award. *See Antco Shipping Co. v. Sidermar, S. p. A.*, 417 F. Supp. 207, 216 (S.D.N.Y. 1976) (describing underlying facts of *Parsons* and citing trade sanctions enacted under 22 U.S.C. § 2370(p), (t) (1971)). In addition, the State Department had expressly instructed Parsons' personnel to leave the country. *See id.* at 216. Nevertheless, after reviewing the drafting of the Convention and the congressional purpose in ratifying it, the Second Circuit properly recognized that despite the importance of these rules on the national level, the "supranational emphasis" of the public policy exception required something more. *See* 508 F.2d at 972-73. The public policy exception was meant to apply to fundamental notions of "morality and justice" — not parochial, albeit important,

---

4. Significantly, Aeroflot's entire "public policy" argument rests on the assumption that a violation of the ITRs necessarily renders the Agreement unenforceable, because "a contract that violates a mandatory rule of law is unenforceable." Pet. 7. This assumption is unfounded. In fact, New York courts – the Agreement provides for application of New York or Russian law – are generally reluctant to find contracts unenforceable, even if held to be illegal, where a failure to enforce the contract would result in an unfair windfall. *See, e.g., Lloyd Capital Corp. v. Pat Henchar Inc.*, 603 N.E.2d 246, 247-48, 80 N.Y.2d 124, 127-28 (1992).

foreign policy objectives. The panel summarized its conclusion by holding that "[t]o deny enforcement of this award largely because of the United States' falling out with Egypt in recent years would mean converting a defense intended to be of narrow scope into a major loophole in the Convention's mechanism for enforcement." 508 F.2d at 974. Contrary to Aeroflot's suggestion, Pet. 14, nothing in *Parsons* suggests that the decision hinged on the existence or non-existence of a specific statute or "positive law." The issue in *Parsons* was over the nature of the public policy exception itself — whether it was to be defined by reference to the happenstance of national law or by more fundamental principles of "morality and justice." The Second Circuit clearly held that foreign policy — however expressed — did not rise to the level of "public policy" as that term is used in the Convention. *Id.* at 974.

More recently, in *Nat'l Oil Corporation v. Libyan Sun Oil*, 733 F. Supp. 800 (D. Del. 1990), the U.S. District Court for the District of Delaware also addressed whether U.S. trade sanctions constituted public policy for purposes of the Convention. In *Nat'l Oil*, the U.S. Government had enacted a series of trade sanctions against Libya. As a result of these trade sanctions, Sun Oil, an American corporation, failed to perform its contract with a Libyan government entity, which then won an arbitral award against Sun Oil for breach of contract. *See id.* at 805. Sun Oil argued that enforcement of the award was barred under the public policy of the United States, because the United States had directly prevented completion of the contractual project. Sun Oil also argued that enforcing the award would benefit the Qadhafi Government, whose "terrorist activities, which have been condemned internationally, are hardly just a parochial interest of the U.S." *Id.* at 819-20.

The Delaware district court ruled that the foreign policy of the United States — even though clearly and unequivocally expressed in regulations and executive orders — was not synonymous with "public policy" as used in the Convention. *See id.* at 819-20. The court also dismissed Sun Oil's arguments that confirmation of the award "would mean that U.S. dollars would end up financing Qadhafi's terrorist exploits," concluding that "Libya's terrorist tactics and opportunistic attitude toward international commercial arbitration are simply *beside the point.*" *Id.* (emphasis in original); *see also Belship Navigation, Inc. v. Sealift, Inc.*, No. 95 Civ. 2748, 1995 WL 447656, at *6 (S.D.N.Y. July 28, 1995) (compelling arbitration under Convention, despite allegations that underlying agreement violated U.S. trade sanctions, and holding that "[a]lthough 'national policy' prohibits dealing with Cuba, the 'public policy' exception in the Convention 'was not meant to enshrine the vagaries of international politics under the rubric of public policy'") (quoting *Parsons*, 508 F.2d at 974); *Antco Shipping Co. v. Sidermar, S.p.A.*, 417 F. Supp. 207, 217 (S.D.N.Y. 1976) (enforcing arbitration provision because, even if contract violated "national policy," as expressed in the Export Regulations Act and anti-boycott regulations, it did not "contravene the public policy of the United States" for purposes of the Convention).

Faced with the uniformity of U.S. case law on this issue, Aeroflot attempts to rely on foreign cases to justify its position, to little effect. *See* Pet. 13 n.7. Foreign case law obviously does not set precedent for this Court. Moreover, even in the international arena, the widespread acceptance of the *Parsons* analysis has resulted in virtually no refusals to enforce awards due to the public policy exception.

One study demonstrated that, in the first 20 years following the introduction of the Convention,

> of the one hundred and twelve decisions recorded as having applied the New York Convention, only three refused enforcement of an award on the grounds of a breach of public policy. Of those three decisions, two are in fact based on the non-arbitrability of the subject-matter, [and the third could] equally have been based on . . . a violation of the principles of due process.

See FOUCHARD, GAILLARD, & GOLDMAN, INTERNATIONAL COMMERCIAL ARBITRATION 996-98 (Emmanuel Gaillard, *et al.*, eds., Kluwer Law International 1999).[5]

Rather than helping Aeroflot, the few outlying international decisions it cites demonstrate the wisdom of United States courts' interpretation of the Convention and

---

5. The extraordinary reluctance of foreign courts to set aside foreign arbitral awards based on the "public policy exception" is inextricably linked to U.S. courts' narrow interpretation of the exception. Courts and commentators worldwide have adopted the *Parsons* interpretation of its meaning. *See, e.g.*, International Law Association Committee on International Commercial Arbitration, *Final Report on Public Policy as a Bar to Enforcement of International Arbitral Awards*, at 4, *in* International Law Association, *Report of the New Delhi Conference* (2002) ("The most oft-quoted comment, in arbitration case law, is that of Judge Joseph Smith in *Parsons* . . . in which he stated that enforcement of a foreign award should be denied 'only where enforcement would violate the forum state's most basic notions of morality and justice.'"); Susan Choi, *Judicial Enforcement of Arbitration Awards Under the ICSID and New York Conventions*, 28 N.Y.U. J. Int'l L. & Pol. 175, 197 (1997) (describing *Parsons* as "the case setting out the U.S. standard for a public policy violation").

the folly that ensues when national policies are elevated to supranational status. For example, the Malaysian decision cited by Aeroflot actually demonstrates the worst face of national parochialism. While declining, on factual grounds, to vacate an arbitral award, the Malaysian High Court suggested in *dicta* that, in light of Malaysia's long-standing enmity toward and boycott of Israel, it would vacate an award if it were convinced the transaction involved an Israeli party or destination. *See Harris Adacom Corp. v. Perkom Sdn Bhd*, [1994] 3 Malayan L.J. 506 (Kuala Lumpur High Court Dec. 10, 1993), *excerpted in* 22 Y.B. Comm'l Arb. 753. It is hard to imagine a more pernicious precedent for the freedom of international trade, or one less in keeping with the purposes of the Convention.[6]

Aeroflot also cites a case from the United Kingdom, *Soleimany v. Soleimany*, 1998 WL 1043634, [1999] Q.B. 785 (C.A. 1998) (Eng.)), apparently unaware that the *Soleimany* decision has been strictly limited to its facts by a subsequent English Court of Appeal decision that is entirely in accord with *Parsons*. *See Westacre Investments Inc. v. Jugoimport-SPDR Holding Co.*, 1999 WL 477322, [2000] Q.B. 288, [1999] 2 Lloyd's Rep. 65 (C.A. 1999) (Eng.) (enforcing Swiss arbitral award under Convention based on agreement alleged by defendants to violate U.K. and other countries' foreign corrupt practices law); *see also Omnium de Traitement et de Valorisation SA v. Hilmarton Ltd.*, [1999] 2 Lloyd's Rep. 222 (Q.B. Comm. Ct. 1999) (Eng.) (upholding Swiss arbitral

6. Aeroflot also cites an Austrian case that is completely unrelated to trade sanctions, but nevertheless reaches the absurd conclusion that Austrian public policies disfavoring gambling justified a refusal to confirm an arbitral award involving a margin sale. *See Judgment of May 11, 1983*, 1983 Osterreichische Juristenzeitung 519 (Oberster Gerichtshof) (Austria), *excerpted in* 10 Y.B. Comm'l Arb. 421.

award against public policy challenge on foreign corrupt practices grounds, and noting that defendant's reliance on *Soleimany* was "misplaced" in the wake of *Westacre*); Shai Wade, *Westacre v. Soleimany: What Policy? Which Public?*, 2(3) Int'l Arb. L. Rev. 97, 100 (1999) (available on Westlaw) ("The Court of Appeal's decision in *Westacre* . . . signifies a return to the emphasis normally placed on the continued unhindered operation of the New York Convention as an overriding policy in matters concerning international arbitration.").

Aeroflot's contention that "the practice of this country's treaty partners" supports its position, Pet. 16, is therefore without merit. Indeed, considerations of reciprocity with other nations, a fundamental consideration underlying Congress' ratification of the Convention, suggest that U.S. courts' continued narrow interpretation of the "public policy exception" should continue, in accord with the vast majority of courts in other nations. The continued narrow interpretation by U.S. courts of the Convention's public policy exception is a crucial underpinning of international commerce and trade, and the willingness and ability of companies to enter into international commercial agreements.

Finally, Aeroflot's position directly contradicts the pro-enforcement bias of the Convention and of the congressional policy underlying its ratification. Because trade sanctions do not rise to the level of basic notions of morality and justice, they do not provide a "loophole" to enforcement of arbitral awards under the Convention. There is nothing *inherently* wrong with the act of trading with Iran, just as today, there is nothing inherently wrong with trading with Egypt, though when *Parsons* upheld its arbitral award, it was illegal to do

so.[7] The ITRs themselves permit trade with Iran where a license is obtained or when one of many exclusions applies, *see* 31 C.F.R. § 560.501 to .537, demonstrating that the conduct at issue is *malum prohibitum*, not *malum in se*. Thus, the ITRs do not proscribe conduct that is, in and of itself, offensive to basic notions of morality and justice, and therefore could not provide grounds for setting aside an foreign arbitral award under the Convention.

---

7. As another example of what the *Parsons* decision referred to as the "vagaries of international politics," 508 F.2d at 974, the public policy challenge in the 1976 *Antco* case relied on a shipping contract's alleged violation of U.S. regulations forbidding boycotts of Israel – but the unchallenged purpose of the contract, which involved exportation of oil from Libya, would itself be prohibited by U.S. trade regulations only a few years later. *Compare Antco*, 417 F. Supp. at 210, *with Sun Oil*, 733 F. Supp. at 804.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

FRED G. BENNETT
QUINN EMANUEL URQUHART
OLIVER & HEDGES, LLP
865 South Figueroa Street
10th Floor
Los Angeles, CA 90017
(213) 443-3000

JEFFREY A. CONCIATORI
Counsel of Record
ROBERT C. JUMAN
PARTHA P. CHATTORAJ
QUINN EMANUEL URQUHART
OLIVER & HEDGES, LLP
335 Madison Avenue
17th Floor
New York, NY 10017
(212) 702-8100

Attorneys for Respondent